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Point A. In ruling that under the Missouri law plaintiff could recover from defendant in tort only on account of negligence of defendant in acts of actual attempted repair to the fourth tread of the stairway, the Circuit Court of Appeals has decided an important question of local law in a way in conflict with the applicable and controlling decisions of the Supreme Court of Missouri, to the effect that a landlord who has assumed to repair prem-

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ises is under a duty to exercise ordinary care to discover and repair defective conditions and liable for injuries resulting from failure to perform said duty, regardless of whether the landlord had actual knowledge of the defects or actually attempted to remedy them 26, 28

Point B. In ruling the question of defendant's negligence contrary to the Missouri decisions, the Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. Since federal jurisdiction is based upon the fact that defendant is a federal corporation, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The question of defendant's negligence is not governed nor affected by any federal statute or federal policy. The rule of Erie R. R. Co. v. Tompkins applies. The Missouri law "would furnish the governing principles," and have "controlling effect," even if it should be held, contrary to plaintiff's contention, that the rule of Erie R. R. Co. v. Tompkins is not strictly applicable 26, 34

Point C. In holding that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway, contrary to the findings of the District Court, and the evidence, that defendant assumed to repair the entire stairway, the Circuit Court of Appeals has violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." The Circuit Court of Appeals has thereby decided an important question of federal law which has not been, but should be,

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settled by this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court..... 27, 41

Point D. In ruling that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread, contrary to the findings of the District Court, and the evidence, that defendant in fact negligently failed to exercise ordinary care to repair the fourth tread, although it knew or by the exercise of ordinary care should have known of the defective and dangerous condition, the Circuit Court of Appeals has violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." The Circuit Court of Appeals has thereby decided an important question of federal law which has not been, but should be, settled by this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court..... 27, 45

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

MAE HUFFMAN, PETITIONER,

VS.

HOME OWNERS' LOAN CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

The Petition of Mae Huffman respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

For convenience petitioner and respondent will be referred to as plaintiff and defendant. The cause is a civil action, brought in the District Court of the United States for the Western District of Missouri, to recover damages, alleged at $35,000, for personal injuries received by plaintiff in a fall, on the basement stairs of a dwelling

owned by defendant in Kansas City, Missouri, alleged to have been caused by the negligence of the defendant.

Plaintiff is a citizen of the Western District of Missouri, and defendant, Home Owners' Loan Corporation, is incorporated by an Act of Congress, with "authority to sue and be sued in any court of competent jurisdiction, Federal or State" (12 U. S. C., Sec. 1463(a)). Defendant's stock is wholly owned by the United States (12 U. S. C., Sec. 1463(b)). The District Court had jurisdiction on the ground that the suit arose under a law of the United States (28 U. S. C., Sec. 41(1)), the Government of the United States being "the owner of more than one-half" of defendant's capital stock (28 U. S. C., Sec. 42).

The matter involved is a decision of the Circuit Court of Appeals for the Eighth Circuit, which, as plaintiff contends, decides a question of Missouri law in conflict with the controlling Missouri decisions, and violates the rule of *McCaughn* v. *Real Estate Co.*, 297 U. S. 606, 608, and Rule 52(a) of the Federal Rules of Civil Procedure, by disregarding, and in effect setting aside, findings of fact of the District Court, based upon substantial and abundant evidence.

In *D'Oench, Duhme & Co., Inc.* v. *Federal Deposit Insurance Corp.*, No. 206, October Term, 1941, decided March 2, 1942, the opinions disclose, this Court took jurisdiction to determine the precise question of whether the rule of *Erie Railroad Co.* v. *Tompkins* applies where Federal jurisdiction is based upon the fact that a Federal corporation is a party. The Court did not there decide the question because the Court did not find that it was necessarily involved. Plaintiff contends that such precise question is necessarily involved in the case here presented to the Court.

Upon a trial in the District Court without a jury (R. 10-11), the Court found the facts specially, stated separately its conclusions of law thereon, and directed the entry of judgment for plaintiff and against the defendant in the sum of $20,000.00 (R. 307-310). From the judgment so entered defendant appealed to the United States Circuit Court of Appeals for the Eighth Circuit (R. 7-9). The Circuit Court of Appeals, in an opinion by Judge Gardner, reversed plaintiff's judgment and remanded the cause for a new trial (R. 335-344, 124 F. (2d) 684) and overruled a timely petition for rehearing filed by plaintiff (R. 345-357).

On August 15, 1938, defendant rented the premises in question to one George H. Sweeney, effective September 1, 1938 (R. 187, 229). Sweeney and his wife moved in on September 1, 1938, and remained tenants of defendant on January 27, 1939, the date of plaintiff's injury (R. 187, 194-5). The Sweeneys used one room on the first floor for a beauty parlor, and the remainder of the house for residence purposes (R. 194). From November, 1938, to the time of her injury on January 27, 1939, plaintiff was employed as a beauty operator in the beauty parlor, and the Sweeneys furnished her room and board in the house as part of her compensation (R. 12-14, 29, 195).

At the time of her fall and injury, plaintiff had gone part way down the basement stairway, for the purpose of putting a glass gallon jug filled with liquid shampoo on a ledge on the top of a wall at the west or left side of the stairway. The fourth tread from the top of the stairway was split completely through lengthwise from end to end by an old season crack, and the forward portion, only from 3 7/8 to 4 7/8 inches wide, extended beyond the stringers underneath one and one-half inches (R. 130, 193, 201-2, 211, 214, 216-17, 272-3). The

trial court described the conditions as "a pitfall • • • for the unsuspecting occupants of defendant's property" (R. 316). The photograph, Plaintiff's Ex. 8 (R. 85) shows the fourth tread exactly as it was immediately after the accident (R. 81, 199). As plaintiff started to place the jug on the ledge, the forward part of the fourth tread tilted under her right foot and threw her headlong to a landing seven feet below the fourth tread (R. 14-16, 32). At the moment she fell she was turning to her left towards the ledge, her left foot on the third tread and her right foot upon, parallel and even with the outer edge of the forward part of the fourth tread (R. 37-8). The force of her fall pulled the stairway away from the wall, knocked two boards off of the landing railing, and jammed plaintiff's shoulder between the landing and the wall (R. 15-16, 196-9).

Plaintiff sustained a concussion of the brain (R. 55), and was semi-conscious or irrational ten days (R. 50-53). She had a comminuted fracture of the right shoulder (R. 51, 53, 63, 65). Broken glass cut and lodged in her head, face and right hand in many places, with a half dozen deep wounds which left disfiguring scars (R. 50, 51, 56, 57, 63). One piece of glass penetrated her right eyelid and punctured her right eyeball (R. 63, 96-99). She lost much blood and blood transfusion was necessary; she was in such weakened and shocked condition that she was not out of danger of losing her life for three days (R. 51, 54, 63, 67, 70). She was permanently incapacitated as a beauty parlor operator, and there was "serious question," as the trial judge said (R. 317), whether she would ever be able to adjust herself to any gainful occupation (R. 11-14, 28, 45-46, 48, 55, 57-58, 68, 70, 105, 108-109).

Plaintiff's Theory of Liability.

Plaintiff's amended complaint alleged that when defendant rented the premises to Sweeney it agreed to re-

pair the basement steps and thereafter proceeded to make repairs to the steps; that one of the treads of said steps (the fourth from the top under the undisputed evidence) was defective and dangerous in that it was insecure and the outer portion thereof likely to tip when a person stepped or put weight upon it, by reason of not being securely nailed to the stringer underneath it; that in the performance of repairs upon said stairs by defendant defendant negligently failed to repair said tread, remedy said defective or dangerous condition of said tread and make said tread reasonably secure, although defendant could and should have known of said defective and dangerous condition of said tread; that by reason of said negligence of defendant the tread came loose and caused plaintiff to fall and receive the injuries complained of (R. 1-3).

Findings and Evidence in District Court as to Liability.

The District Court found that when defendant rented the premises to Sweeney it agreed that it "would repair and put said premises, including the flight of wooden steps leading from the first floor to the basement of said premises, in reasonably safe condition for use and occupancy * * * and after said renting * * * undertook and attempted to repair said premises, including said steps leading from the first floor to the basement, and performed certain repairs on said premises, including said steps" (R. 307), and that "prior to and during said performance by defendant of repairs on said premises, including said steps, defendant inspected said steps for the purpose of discovering defective and dangerous conditions therein and conditions needing repairs, for the purpose of making said steps reasonably safe for use" (R. 307-8). These findings were supported by the evidence (R. 189, 193, 305, 302-3, 169-175, 180-186).[1]

1. A summary of the details of this evidence appears at pages 8, 9, 10, *infra*.

The District Court further found that "* * * when defendant attempted to repair and performed repairs upon said premises, including said steps leading from the first floor to the basement, and for a long time prior thereto, the fourth tread from the top of said steps was and had been defective and dangerous, in that it was insecure, split in two from end to end, and the outer portion thereof likely to tip when a person stepped or put weight upon it, by reason of not being securely nailed to the stringer underneath it; * * * that in said performance by defendant of repairs upon said stairs * * * defendant negligently failed to exercise ordinary care to repair said fourth tread from the top, to remedy said defective and dangerous condition of said tread and to make said tread reasonably secure, although defendant knew or by the exercise of ordinary care could and should have known of said defective and dangerous condition of said tread" (R. 307-8). These findings were supported by the evidence (R. 119-122, 130, 167, 170-175, 193, 200-202, 211, 214-15, 215-222, 248, 256-6, 273-5, 278-285, 296, 308).[2]

Rulings of the Circuit Court of Appeals.

The Circuit Court of Appeals held that "under the decisions in Missouri, a tort action can only be sustained against a defendant landlord who actually makes a repair and as a result of his negligence in so doing injury results" (R. 340, 124 F. (2d) 687), and that "recovery could only be had for injuries resulting from negligent acts of the defendant, and we think that negligence must in the instant case be confined to any acts of attempted repair of the fourth tread" (R. 341, 124 F. (2d) 688).

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2. A summary of the details of this evidence appears at pages 10, 11, 12, *infra*.

In so ruling the Circuit Court of Appeals ruled contrary to the controlling decisions of the Supreme Court of Missouri, in *Lasky* v. *Rudman*, 337 Mo. 555, 560, 85 S. W. (2d) 501, 503, that if the defendant landlord in that case "assumed to repair" the porch railing there involved, but "negligently *failed*[3] to exercise ordinary care to *discover* and *repair* the defective condition, she would be liable for all damages proximately resulting from such failure," and approved as the applicable law of Missouri an earlier ruling of another Missouri Court that "when defendant (landlord) voluntarily *assumed to repair* the defective *premises* she took upon herself the burden to use ordinary care to repair the premises so that they would last for a reasonable length of time, and in discharging this duty to repair, if she *failed to remove* rotten boards, floors, supports and other materials that should have been removed to make the place reasonably safe, she was guilty of *misfeasance* and not nonfeasance." The ruling of the Circuit Court of Appeals is also contrary to the earlier decision of the Supreme Court of Missouri in *Shaw* v. *Butterworth*, 327 Mo. 622, 631, 38 S. W. (2d) 57, 62, to the effect that a landlord, having undertaken repairs, is liable in damages if he is "*negligent* in *any way*, notwithstanding" he "may not have had actual knowledge of any defect."

The Circuit Court of Appeals ruled, as regards the fact of defendant's undertaking, that "it is conclusively established, not only that the defendant actually limited its repair to the bottom landing (of the stairway in question), but that Sweeney (the tenant) was advised that its repair would be so limited" (R 340, 124 F. (2d) 687).

In so ruling the Circuit Court of Appeals disregarded the District Court's findings that the defendant

3. All italics in this petition are ours.

agreed[4] with Sweeney and undertook to repair and put in reasonably safe condition for use the premises, "including the flight of wooden steps" in question, and thereafter "undertook and attempted to repair * * * said steps * * * and performed certain repairs on said premises, including said steps * * *," and "prior to and during said performance * * * of repairs on said premises, including said steps, defendant inspected said steps for the purpose of discovering defective and dangerous conditions therein and conditions needing repairs, for the purpose of making said steps reasonably safe for use" (R. 307-8).

And in so ruling and disregarding the trial court's findings the Court considered only certain written specifications[5], and disregarded the following uncontradicted evidence, which supported the trial court's findings:

> Sweeney testified that defendant's representatives Hess and Kelly told him that the *premises would be put* 'in safe and livable condition' (R. 305); that he mentioned the stairs to Hess and that Hess told him 'the *house* would be * * * put in first [class] condition from the roof to the yard' (R. 189); that Hess told him 'from time to time not to worry about it, *the place* would be put in safe condition and ready for me by the 1st of September' (R. 193). Hess, while testifying that he gave Sweeney the specifications to look over, admitted that '*further than that*' he told Sweeney 'that the *house* would be placed in *rentable condition*', and, when asked whether he told Sweeney that the re-

4. Plaintiff's suit is not in contract for breach of defendant's agreement with Sweeney. Defendant's agreement with Sweeney, however, was competent evidence of defendant's undertaking to repair the stairway, which is the basis of defendant's tort liability (*Shaw* v. *Butterworth*, 327 Mo. 622, 628-9, 38 S. W. (2d) 57, 60).

5. Which were prepared upon a prior inspection and later given to a contractor whom defendant employed to work on the premises after the letting to Sweeney (R. 113-114, Exhibit 11, R. 135-163, R. 141, 236-47).

pairs 'would be *general and complete*', admitted 'I believe *that was* the, you might say, context of our conversation' (R. 302-303).

Defendant's Inspector King testified that defendant employed and authorized him to inspect the premises during the progress of repairs; that he made five such inspections (R. 171, 181, 182, 169); that it was his duty to *discover* anything in or about the premises that was 'unsafe,' whether it was specially covered by the formal specifications or not (R. 170, 180, 182, 173); that he inspected the 'stairway' in question to see whether it was 'secure' and 'safe', 'safe to hold a person' (R. 172-173, 182); that it was his duty to inspect 'and check along the stringers', to see whether the nails were 'driven' into the stringer or had 'chipped off part of the stringer' so they were 'not holding' (R. 173, 170); that in inspecting the stairway he stood on the basement floor 'alongside these stairs' (R. 173) so that the 4th tread (which tilted and threw plaintiff) was 'just about at the level of your eyes' (R. 173); that he made an examination to see what kind of nails were holding *the treads* to the stringer (R. 175); that he went under the stairway 'to see that the nail was nailed in properly' (R. 186); that while under the stairway he could observe the condition of the entire stairway (R. 185-186); that he actually 'noticed' the 'chipped part of this stringer', and 'imagined' he saw that one of the nails supposed to enter that stringer on the 4th tread was 'sticking out' and 'out holding' (R. 174); that he was hunting for anything 'unsafe', whether included in the specifications or not (R. 170, 180, 182, 173), and although he knew that this was not 'proper construction' he nevertheless failed to have the 4th tread repaired (R. 174). As to King's *duty* upon discovery of the foregoing obviously hazardous condition, he testified as follows (R. 170):

"Q. Suppose you would see something that was a hazard there or something that would make

the place unsafe, it was your *duty,* wasn't it, to report that and *get something done about it?* A. I would make a report on it.

Q. That was a part of your duties, wasn't it? A. *Oh, certainly.*

Q. They didn't want you out there and inspecting and leaving a place in an unsafe condition, did they? A. That is right."

Lastly, the Circuit Court of Appeals ruled "but if • • • it be assumed that the defendant might be held for any failure to exercise ordinary care in the repair of the entire stairway, we do not believe there is substantial evidence to sustain the judgment" (R. 341, 124 F. (2d) 688), and concluded that "there was no substantial evidence that the defendant failed to exercise ordinary care in attempting to ascertain the condition of this fourth tread, nor in failing to repair it" (R. 343, 124 F. (2d) 688).

In so ruling the Circuit Court of Appeals has disregarded the finding of the trial court that in the performance by defendant of repairs upon the stairway "defendant negligently failed to exercise ordinary care to repair the fourth tread from the top, to remedy said defective and dangerous condition of said tread and to make said tread reasonably secure, although defendant knew or by the exercise of ordinary care could and should have known of said defective and dangerous condition of said tread" (R. 308).

And in so ruling and so disregarding the trial court's findings the Circuit Court of Appeals disregarded the following evidence which overwhelmingly supported the trial court's findings:

The 4th tread from the top (which tilted and threw plaintiff) was 'split clear through', lengthwise, 'from end to end' (R. 130, 201-2, 211, 193).

The split or crack was an old one (R. 193, 214, 278, 282-3), 'possibly 15 years old' (R. 130). There was paint down in the crack (R. 201, 214-15), apparently 4 or 5 years old (R. 231). There were 'scrapings of lint' in the crack (R. 202). A corner of the east stringer under this 4th tread was broken off, so that one of the nails supposed to hold the tread to the stringer did not enter the stringer at all (R. 120, 275, 278, 174, 175, 202, 296). This nail had 'paint on it', showing that it was 'not holding' to anything (R. 120, 296, 275, 278). The north half of the tread (the half which tilted and threw plaintiff) was 3-7/8 inches wide at the east end and 4-7/8 inches wide at the west end (R. 274). The overhang of the north edge of the tread, that is its projection to the north beyond the stringers, was 1½ inches, or about 1/3 of the full width of the tread (R. 216-17, 272-3, Exhibit 11). In this north or broken-off half of the tread there were two nails in the west end (an 8-penny and a 16-penny), and there were two 8-penny nails in the east end (R. 220, 119-120, 256). The front or north one of these latter two nails had missed the stringer entirely, and was not holding to anything; and the other nail had worked up and down in its hole so much that 'you could almost drop a new nail down in the hole' (R. 200, 220, 120). It is conceded that 8-penny nails were inadequate to hold a tread as thick as this one, and that 16-penny nails should have been used instead (R. 256, 278-9, 281, 220, 167). Under the foregoing conditions, the 4th tread was not reasonably safe for use (R. 220-1, 257, 279, 284, 285). It was likely to tilt if a person should step on the front or north edge (R. 221, 222, 256, 257, 259, 279, 284, 285), and was therefore likely to 'throw' any person using the stairway (R. 122). The danger of this would be increased if the weight of a person were placed on the north or front edge of the tread (R. 222). The undisputed evidence is that all treads in stairways should be strong enough to 'hold the weight of a person standing any place on tread' (R. 221-2).

In making a proper inspection of this stairway an inspector should look at the bearings, treads, risers and hoists (stringers); he should see whether any treads were split, should examine the thickness of the treads, the size of nails holding the treads, and whether the treads were properly and securely nailed to the stringers, should take into account the 1½ inch overhang, and whether the stairway was solid (R. 215, 216, 217, 218, 221, 170, 172, 173, 174). *An overhang of as much as 1½ inches in this split and broken 4th tread was 'dangerous'* (R. 221). *Any competent contractor ought to have seen that this split tread 'was weak'* (R. 221).

Notwithstanding the foregoing facts, the undisputed evidence is that defendant entirely failed to make any repair whatever to the unsafe 4th tread (R. 248, 261, 264, 271). Butterworth admitted that he possibly overlooked its condition (R. 121). King failed to see the split condition of the tread (R. 173), although the split had been there for years (R. 130) and was so wide as to have gathered lint scrapings (R. 202) and paint (R. 201, 214-15).

Reasonable construction practice would be, if it was desired to use the two halves of the broken 4th tread, to nail a two-by-four, or two-by-six board underneath the broken tread to hold it together (R. 219). King was employed to inspect and discover defects during the progress of the work, for purpose of removing all unsafe conditions and was present and at least attempted to so cover the basement stairs (R. 169-179, 180-186).

B.

Statement of the Jurisdiction of This Court.

(1) Statutory provision believed to sustain the jurisdiction.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925, c.229, Sec. 1, 43 Stat. 938 (28 U. S. Code, Sec. 347(a)), and under the same Act c.229, Sec. 8, 24 Stat. 940 (28 U. S. Code, Sec. 350).

The case properly originated in the United States District Court under Sec. 24(1) of the Judicial Code as amended by the Act of March 3, 1911, c.231, Sec. 24, 36 Stat. 1091 (28 U. S. Code, Sec. 41(1)) and the Act of February 13, 1925, c.229, Sec. 12, 43 Stat. 941 (28 U. S. Code, Sec. 42), as a proceeding brought against a corporation incorporated under an Act of Congress wherein the government of the United States is the owner of more than one-half of its capital stock, with authority to sue and be sued in any court of competent jurisdiction, Federal or State, Act of June 13, 1933, c.64, Sec. 4, 48 Stat. 129; Apr. 27, 1934, c.168, Secs. 1(a), 2, 3, 4, 13, 48 Stat. 643, 644, 645, 647; June 27, 1934, c.847, Secs. 506 (a), (b), 508 (b), 48 Stat. 1263, 1264; May 28, 1935, c.150, Secs. 10-16, 17 (a), 49 Stat. 296-297, (12 U. S. Code, Sec. 1463 (a) and (b)).

(2) The date of the judgment to be reviewed.

The judgment of the Circuit Court of Appeals for the Eighth Circuit reversing the judgment of the District Court was entered on January 13, 1942 (R. 343). Plaintiff, as appellee, filed a petition for rehearing on January 28 (R. 345-356), which the Circuit Court of Appeals denied on February 2, 1942 (R. 357). The Circuit Court of Appeals has stayed its mandate until April 12, 1942, and pending the filing of a petition for certiorari, evidenced by a certificate thereof by the Clerk of this Court, on or before April 12 (R. 358, and certificate of the Clerk of the Circuit Court of Appeals filed with the petition herein). This petition for certiorari and supporting transcript of the record are filed prior to April 6, 1942, with request that the Clerk of this Court send to the Clerk

of the Circuit Court of Appeals certificate of the filing thereof.

(3) Statement of the nature of the case and the rulings of the Circuit Court of Appeals bringing the case within the jurisdiction of this Court.

The case is an action for damages for personal injuries caused by the negligent failure of defendant landlord to repair the fourth tread of the basement stairway of rented premises, when defendant had undertaken to repair the stairway (R. 1-4).

The Circuit Court of Appeals for the Eighth Circuit reversed (R. 335-344) a judgment for plaintiff rendered upon a trial in the United States District Court without a jury (R. 10-11, 7-8, 309-310). The Circuit Court of Appeals ruled that under the Missouri law plaintiff could recover from the defendant in tort only on account of negligence of defendant in *acts of actually attempted repair to the fourth tread* of the stairway (R. 340-341), thereby ruling in conflict with applicable Missouri decisions to the effect that a landlord who has assumed to repair premises is under a duty to exercise ordinary care to *discover* and *repair* defective conditions and liable for injuries resulting from failure to perform said duty, *regardless of whether the landlord had actual knowledge of the defects or actually attempted to remedy them* (*Lasky* v. *Rudman*, 337 Mo. 555, 560, 85 S. W. (2d) 501, 503; *Shaw* v. *Butterworth*, 327 Mo. 622, 631, 38 S. W. (2d) 57, 62).

The Circuit Court of Appeals also ruled that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway (R. 340), *contrary* to the findings of the District Court (R. 307-8), and practically undisputed evidence (R. 189, 193, 305, 302-3, 169-175, 180-186), that defendant landlord *assumed to repair the entire stairway.*

The Circuit Court of Appeals also ruled that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread (R. 341, 343), *contrary* to the finding of the District Court (R. 308), and practically undisputed evidence (R. 119-122, 130, 167, 170-175, 193, 200-202, 211, 214-15, 215-222, 248, 256-6, 273-5, 278-285, 296, 308) that defendant in fact negligently, failed to exercise ordinary care to repair the fourth tread, although it knew or by the exercise of ordinary care should have known of the defective and dangerous condition.

In so ruling as to the facts, in both particulars, the Circuit Court of Appeals violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that: "Findings of fact (upon a trial of the facts without a jury) shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In so ruling the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court; has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of the other Circuit Courts of Appeals upon the effect of the findings of the District Court, supported by substantial evidence.

(4) Cases believed to sustain the jurisdiction of this court. Decision of question of defendant's negligence in conflict with controlling Missouri decisions.

Lasky v. *Rudman,* 337 Mo. 555, 560, 85 S. W. (2d) 501, 503.

Shaw v. *Butterworth,* 327 Mo. 622, 628-9, 38 S. W. (2d) 57, 60.

Keifer & Keifer v. *Reconstruction Finance Corp.*, 306 U. S. 381, 396.

Erie Railroad Co. v. *Tompkins*, 304 U. S. 64.

Fidelity Union Trust Co. v. *Field*, 311 U. S. 169, 177.

Six Companies of California v. *Joint Highway District*, 311 U. S. 180, 188.

West v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 236.

Stoner v. *New York Life Ins. Co.*, 311 U. S. 464, 467.

Royal Indemnity Co. v. *U. S.*, 313 U. S. 289, 296.

Just v. *Chambers*, 312 U. S. 383, 387.

Board of Commissioners v. *U. S.*, 308 U. S. 343 352.

U. S. v. *Guaranty Trust Co.*, 293 U. S. 340.

Brown v. *U. S.*, 263 U. S. 78, 86.

Seaboard Air Line Ry. Co. v. *U. S.*, 261 U. S. 299, 306.

O'Sullivan v. *Felix*, 233 U. S. 318.

McClaine v. *Rankin*, 197 U. S. 154.

Compare *D'Oench, Duhme & Co., Inc.* v. *Federal Deposit Insurance Corp.*, No. 206, October Term, 1941, decided March 2, 1942.

Setting aside findings of fact of the District Court amply supported by the evidence in violation of Rule 52(a), Federal Rules of Civil Procedure, involving a question which should be settled by this Court, departure from course of judicial proceedings calling for an exercise of this Court's power of supervision, and in conflict with decisions of other Circuits.

McCaughn v. *Real Estate Company*, 297 U. S. 606, 608.

The Josephine & Mary, 1 Cir., 120 F. (2d) 459.

Cray, McFawn & Co. v. *Hegarty, Conroy & Co.*, 2 Cir., 109 F. (2d) 443.

Commonwealth Trust Co. of Pittsburgh v. *Reconstruction Finance Corporation*, 3 Cir., 120 F. (2d) 254.

Smith v. *U. S.*, 3 Cir., 121 F. (2d) 692, affirming 34 F. Supp. 947.

Buckley v. *Christmas*, 4 Cir., 121 F. (2d) 323, *certiorari* denied 62 S. Ct. 180.

Chalk v. *U. S.*, 4 Cir., 114 F. (2d) 207, *certiorari* denied 312 U. S. 679.

Mississippi Valley Timber Co. v. *Mengel Co.*, 5 Cir., 112 F. (2d) 947.

Van Auken v. *Second Nat. Bank & Trust Co. of Saginaw*, 6 Cir., 117 F. (2d) 938, *certiorari* denied 313 U. S. 593.

Gary Theatre Co. v. *Columbia Pictures Corporation*, 7 Cir., 120 F. (2d) 891.

Maier v. *Continental Oil Co.*, 7 Cir., 120 F. (2d) 237, *certiorari* denied 62 S. Ct. 101.

Gates v. *General Casualty Co., of America*, 9 Cir., 120 F. (2d) 925.

Maryland Casualty Co. v. *Stark*, 9 Cir., 109 F. (2d) 212.

Mid-Continent Pipe Line Co. v. *Whiteley*, 10 Cir., 116 F. (2d) 871.

Thatenhorst v. *U. S.*, 10 Cir. 119 F. (2d) 567.

Consolidated Realty Corporation v. *Dunlop*, App. D. C., 114 F. (2d) 16, 72 App. D. C. 273.

C.

The Questions Presented.

(1) In ruling that under the Missouri law, plaintiff could recover from defendant in tort only on account of negligence of defendant in *acts* of *actual attempted repair* to the *fourth tread* of the stairway, has the Cir-

cuit Court of Appeals decided an important question of local law in a way in conflict with the applicable local decisions, *Lasky* v. *Rudman*, 337 Mo. 555, 560, 85 S. W. (2d) 501, 503, and *Shaw* v. *Butterworth*, 327 Mo. 622, 631, 38 S. W. (2d) 57, 62?

(2) In ruling the question of defendant's negligence contrary to the Missouri decisions, has the Circuit Court of Appeals decided a federal question in a way in conflict with *Erie R. R. Co.* v. *Tompkins* and other applicable decisions of this Court? Since federal jurisdiction of plaintiff's case is based upon the fact that defendant is a federal corporation, has the Circuit Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court?

(3) In holding that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway, contrary to the findings of the District Court, and the evidence, that defendant assumed to repair the entire stairway, has the Circuit Court of Appeals violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness?" And has the Circuit Court of Appeals thereby decided an important question of federal law which has not been, but should be, settled by this Court, or has it so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, or rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court?

(4) In ruling that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the

fourth tread, contrary to the findings of the District Court, and the evidence, that defendant in fact, negligently failed to exercise ordinary care to repair the fourth tread, although it knew or by the exercise of ordinary care should have known of the defective and dangerous condition, has the Circuit Court of Appeals violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness?" And has the Circuit Court of Appeals thereby decided an important question of federal law which has not been, but should be, settled by this Court; or so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; or rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court?

D.

Reasons Relied On For The Allowance Of The Writ.

(1) In ruling that under the Missouri law, plaintiff could recover from defendant in tort only on account of negligence of defendant in *acts of actual attempted repair* to the *fourth tread* of the stairway, the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with the applicable local decisions, *Lasky* v. *Rudman*, 337 Mo. 555, 560, 84 S. W. (2d) 501, 503, and *Shaw* v. *Butterworth*, 327 Mo. 622, 631, 38 S. W. (2d) 57, 62, to the effect that a landlord who has assumed to repair premises is under a duty to exercise ordinary care to *discover* and *repair* defective conditions and liable for injuries resulting from failure to perform said duty, *regardless*

of whether the landlord had *actual knowledge* of the defects or actually *attempted to remedy them.*

(2) In ruling the question of defendant's negligence contrary to the Missouri decisions, the Circuit Court of Appeals has decided a federal question in a way in conflict with *Erie R. R. Co.* and other applicable decisions of this Court. Defendant's negligence is not a federal question. Since federal jurisdiction of plaintiff's case is based upon the fact that defendant is a federal corporation, the precise question decided by the Circuit Court of Appeals is an important question of federal law which has not been, but should be, settled by this Court.

(3) In holding that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway, contrary to the findings of the District Court and the evidence that defendant assumed to repair the entire stairway, the Circuit Court of Appeals has violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness," the Circuit Court of Appeals has thereby decided an important question of federal law which has not been, but should be, settled by this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court.

(4) In ruling that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread, contrary to the findings of the District Court, and the evidence, that defendant in fact negli-

gently failed to exercise ordinary care to repair the fourth tread, although it knew or by the exercise of ordinary care should have known of the defective and dangerous condition, the Circuit Court of Appeals has violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." The Circuit Court of Appeals has thereby decided an important question of federal law which has not been, but should be, settled by this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court.

CONCLUSION.

Petitioner respectfully avers that the reversal of plaintiff's judgment is based upon the decision by the Circuit Court of Appeals of an important question of Missouri law contrary to the applicable Missouri decisions, fortified by rulings of the Court in disregard of findings of fact of the District Court which were amply supported by the evidence, in violation of Rule 52(a) of the Federal Rules of Civil Procedure.

WHEREFORE, your petitioner prays that a writ of *certiorari* issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals in the case numbered and entitled on its docket No. 12108, *Civil, "Home Owners' Loan Corporation, Appellant,* v. *Mae Huffman, Appellee,"* to

the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and your petitioner prays that the certified copy of the record and proceedings of said United States Circuit Court of Appeals for the Eighth Circuit, which is filed as a part of and as an exhibit to this petition, may be treated as a return to said writ of *certiorari;* and your petitioner prays that she may have such other and further remedies in the premises as to the Court may seem appropriate and in conformity with law; and your petitioner will ever pray.

Mae Huffman,
Petitioner.

PRICE WICKERSHAM,
Bryant Building,
Kansas City, Missouri.

WILLIAM S. HOGSETT,
HALE HOUTS,
Fidelity Building,
Kansas City, Missouri.
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

MAE HUFFMAN, PETITIONER,

VS.

HOME OWNERS' LOAN CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Eighth Circuit, entered January 13, 1942, (R. 335-343) is reported 124 F. (2d) 684. The opinion of the District Court (R. 313-317) is reported 39 Fed. Supp. 139.

II.

Grounds on Which the Jurisdiction of this Court is Invoked.

The statement of the grounds on which the jurisdiction of this Court is invoked, meeting the require-

ments of Rule 12, Par. 1, has been made under "Statement of the Jurisdiction of this Court," Part B, of the foregoing petition for *certiorari,* which is adopted and made a part of this brief.

III.

Statement of the Case.

Petitioner has stated the case in the "Summary Statement of the Matter Involved," Part A, of the foregoing petition for *certiorari,* which is adopted and made a part of this brief.

IV.

Specification of Assigned Errors Intended to be Urged.

(1) The Circuit Court of Appeals erred in deciding that under the Missouri law plaintiff was not entitled to recover from the defendant except for negligence of the defendant in acts of actually attempted repair to the fourth tread of the stairway in question.

(2) The Circuit Court of Appeals erred in deciding the question of defendant's negligence contrary to the law of Missouri and in not holding that if the defendant undertook to repair the stairway it was liable for failure to exercise ordinary care to discover and repair the defective fourth tread from the top, even though defendant performed no repairs upon the tread.

(3) The Circuit Court of Appeals erred in deciding that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway, contrary to the findings of the District Court and amply sufficient evidence that defendant assumed to repair the entire stairway.

(4) The Circuit Court of Appeals erred in deciding that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and re-

pair the defective condition of the fourth tread, contrary to the finding of the District Court, and amply sufficient evidence that defendant in fact negligently failed to exercise ordinary care to repair the fourth tread, although it knew or by the exercise of ordinary care could and should have known of the defective and dangerous condition which caused plaintiff's injury.

V.

ARGUMENT.

Summary of the Argument.

Point A.

In ruling that under the Missouri law plaintiff could recover from defendant in tort only on account of negligence of defendant in acts of actual attempted repair to the fourth tread of the stairway, the Circuit Court of Appeals has decided an important question of local law in a way in conflict with the applicable and controlling decisions of the Supreme Court of Missouri, to the effect that a landlord who has assumed to repair premises is under a duty to exercise ordinary care to discover and repair defective conditions and liable for injuries resulting from failure to perform said duty, regardless of whether the landlord had actual knowledge of the defects or actually attempted to remedy them.

Point B.

In ruling the question of defendant's negligence contrary to the Missouri decisions, the Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. Since federal jurisdiction is based upon the fact that defendant is a federal corporation, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The question of defendant's negligence is not governed nor affected by any federal statute or federal policy. The rule of Erie R. R. Co. v. Tompkins applies. The Missouri law "would furnish the governing principles," and have "controlling effect," even if it should be held, contrary to plaintiff's contention, that the rule of Erie R. R. Co. v. Tompkins is not strictly applicable.

Point C.

In holding that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway, contrary to the findings of the District Court, and the evidence, that defendant assumed to repair the entire stairway, the Circuit Court of Appeals has violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." The Circuit Court of Appeals has thereby decided an important question of federal law which has not been, but should be, settled by this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court.

Point D.

In ruling that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread, contrary to the findings of the District Court, and the evidence, that defendant in fact negligently failed to exercise ordinary care to repair the fourth tread, although it knew or by the exercise of ordinary care should have known of the defective and dangerous condition, the Circuit Court of Appeals has violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." The Circuit Court of Appeals has thereby decided an important question of federal law which has not been, but should be, settled by this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court.

ARGUMENT.

Point A.

In ruling that under the Missouri law plaintiff could recover from defendant in tort only on account of negligence of defendant in acts of actual attempted repair to the fourth tread of the stairway, the Circuit Court of Appeals has decided an important question of local law in a way in conflict with the applicable and controlling decisions of the Supreme Court of Missouri, to the effect that a landlord who has assumed to repair premises is under a duty to exercise ordinary care to discover and repair defective conditions and liable for injuries resulting from failure to perform said duty, regardless of whether the landlord had actual knowledge of the defects or actually attempted to remedy them.

The highest court of Missouri is the final authority upon the Missouri law. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 177; *Six Companies of California* v. *Joint Highway District*, 311 U. S. 180, 188; *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 236; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464, 467.

The highest court of Missouri is the Supreme Court (Section 1 and the Amendment of 1890 to Article VI of the Constitution of Missouri). The Supreme Court has "general superintending control over all inferior courts," (Sec. 3 Art. VI, Constitution of Missouri), including "superintending control over the courts of appeals by mandamus, prohibition and certiorari" (Sec. 8 Amendment 1884, Art, VI, Constitution of Missouri). Section 6 of the Amendment of 1884 to Article VI of the Missouri Constitution provides that "* * * the last

previous ruling of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals."

By the Amendment of 1890 of Article VI of the Missouri Constitution, the Supreme Court consists of seven judges with two divisions, Nos. 1 and 2, and the Court en Banc comprising both divisions (Secs. 1 to 6, inclusive, Amendment of 1890, Art. VI, Constitution of Missouri). The two divisions have concurrent jurisdiction in civil cases, and decisions of the divisions are decisions of the Court (Sec. 1 of the Amendment of 1890, Art. VI, Constitution of Missouri).

Decisions by the Court en Banc are controlling over decisions by either division. In the absence of a decision by the Court, *en banc*, the latest decision of either division of the Supreme Court is controlling authority. *State ex rel. Hopkins* v. *Daues* (en banc) 319 Mo. 733, 740, 742; 6 S. W. (2d) 893, 896, 897.

The most recent decision of the Supreme Court of Missouri upon the duty and the liability of a landlord who has undertaken to make repairs of premises, is *Lasky* v. *Rudman*, 337 Mo. 555, 560, 85 S. W. (2d) 501, 503, decided by Division No. 1. In harmony with this case, and also relied upon by us, is the earlier case of *Shaw* v. *Butterworth*, 327 Mo. 622, 628, 38 S. W. (2d) 57, 60, decided by Division No. 2 of the Missouri Supreme Court. The Circuit Court of Appeals has cited no case by the Court *en banc*, and we are aware of no Court *en banc* decisions of the Supreme Court of Missouri upon the question involved. It follows that the Lasky case is controlling authority on the law in Missouri, and that the Shaw case is persuasive in so far as it is in harmony with the Lasky case.

The Circuit Court of Appeals has attempted to distinguish the Lasky case and Shaw cases, but has relied

largely on earlier decisions of the Supreme Court, and upon decisions of Missouri Courts of Appeals. Indeed the Circuit Court of Appeals quotes with aproval from the case of *Davis* v. *Cities Service Co.*, 131 S. W. (2d) 865, decided by the St. Louis Court of Appeals in 1939, which held that a landlord who attempted repairs after leasing was not liable unless he negligently "made the premises more dangerous for use, or changed the physical condition of the premises for the worse," but failed to mention the cited case of *Bressmer* v. *Kennedy*, 154 S. W. (2d) 401, decided by the St. Louis Court of Appeals on October 24, 1941, which wholly departed from the Davis case, recognized the rule of *Lasky* v. *Rudman*, 337 Mo. 555, 85 S. W. (2d) 501, and cited with approval *Marks* v. *Nambil Realty Co.*, 245 N. Y. 256 (an opinion by Chief Judge Cardozo) as follows:

> "There is a suggestion * * * that to make the landlord liable, the negligent repairs must have aggravated the defect, so that what was dangerous before became more dangerous than ever. We cannot yield assent to this restriction of the field of duty. The tenant does not have to prove that by the negligent making of the repairs what was wrong has been made worse. *His case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right.*"

The question of defendant's negligence is ruled by the Lasky and Shaw cases. It is therefore unnecessary to consider the earlier Missouri Supreme Court cases relied upon by the Circuit Court of Appeals, or the more recent Court of Appeals case relied upon by it. The Lasky and Shaw cases supersede any conflicting prior Supreme Court cases, and are controlling over any Court of Appeals case, prior or subsequent.

The ruling as to the Missouri law, of which petitioner complains, as pointed out in her petition, is the

ruling of the Circuit Court of Appeals that "under the decisions in Missouri, a tort action can only be sustained against a defendant landlord who *actually makes* a repair and as a result of his negligence in so doing, injury results" (R. 340), and that "recovery could only be had for injuries resulting from negligent *acts*[1] of defendant, and we think that negligence must in the instant case be confined to any *act of attempted repair* of the *fourth tread*" (R. 341).

It is respectfully submitted that the Circuit Court of Appeals decided the question in conflict with the decision of the Supreme Court of Missouri in the Lasky case, wherein the Missouri Court said (337 Mo. l. c. 560, 85 S. W. (2d) l. c. 503):

> "*If defendant did attempt to repair the railing, it was her duty to exercise reasonable care to discover and repair the decayed and rotten condition of the railing so as to make it reasonably safe.* The rule in that regard is well stated in *Vollrath* v. *Stevens*, 199 Mo. App. 5, 202 S. W. 283, 286, as follows: '• • • However, *when defendant voluntarily assumed to repair the defective premises she took upon herself the burden to use ordinary care to repair the premises* so that they would last for a reasonable length of time; and in discharging this duty to repair, *if she failed to remove rotten boards, floors, supports, and other material that should have been removed to make the place reasonably safe, she was guilty of misfeasance, and not nonfeasance. Finer* v. *Nichols, supra*, 175 Mo. App. (525) loc. cit. 538, 157 S. W. 1023.'
>
> "Instructions are given to guide lay jurors to the proper solution of a case. Of course the defective condition of the railing caused it to fall, but, if defendant *assumed* to repair the railing, but negligently failed to exercise ordinary care to *discover* and *repair* the defective condition, *she would be*

1. All italics in this brief are ours.

> *liable for all damages proximately resulting from such failure.* The evidence favorable to plaintiff authorized such a finding, and for that reason the jury should have been so instructed. It was therefore improper and misleading to give an instruction which was calculated to cause a lay jury to believe that, although it found that defendant assumed to repair the railing, but negligently *failed to discover and repair the alleged defect*, yet, if it further found that natural wear and tear of the railing and not the negligent repair thereof caused it to fall, plaintiff could not recover."

It is also submitted that the Circuit Court of Appeals ruled the question of Missouri law contrary to the decision of the Supreme Court of Missouri in the Shaw case, where the Missouri Court said (327 Mo. 622, 628, 38 S. W. (2d) 57, 60):

> "An exception or extension of the rule obtains, however, to the effect that a landlord, *undertaking* to make repairs upon the demised premises, is liable upon making such repairs for an injury caused by his *negligence* or that of his servant. *And he is liable notwithstanding the repairs were made gratuitously or without obligation.*"

It is also submitted that the Circuit Court of Appeals ruled the question of Missouri law contrary to the decision of the Supreme Court of Missouri in the Shaw case (327 Mo. 622, 628, 631, 38 S. W. (2d) 57, 52), to the effect that a landlord who has undertaken to repair demised premises, is liable in damages if he is "negligent in any way, notwithstanding" he "may not have had actual knowledge of any defect."

The Circuit Court of Appeals attempted to distinguish the Lasky case on the ground that in that case "the defendant undertook to make repair of the very instrumentality which caused the injury" (R. 339), meaning, presumably, the porch railing involved in the

Lasky case. The Lasky case is not to be so distinguished.

In the first place, it clearly appears from the opinion that defendant did not discover or even attempt to repair the decayed parts of the porch railing which caused the railing to give way and cause injury. The decayed parts were only parts of the *railing* involved in the Lasky case. So in the case at bar the fourth tread was only a part of the *stairway* which defendant undertook to repair. To use the language of the Circuit Court of Appeals, the "instrumentality" which defendant undertook to repair and which caused the injury to plaintiff in the case at bar was the *stairway*, which defendant negligently failed to make safe by failing to repair the fourth tread. In the Lasky case the instrumentality which caused the injury was the railing which defendant failed to make reasonably safe by failing to discover and repair the decayed part.

Nor would the Lasky case be distinguishable if its facts could be distinguished from the facts of the case at bar as the Circuit Court of Appeals has attempted to distinguish them. In deciding the Lasky case the Supreme Court of Missouri quoted with approval from an opinion of a Court of Appeals, and thereby itself declared the Missouri law to be that when a landlord assumed to repair "defective *premises*" the landlord assumed "the burden to use ordinary care to repair the *premises* so that they would last for a reasonable length of time," and that if "in discharging this duty to repair" the landlord "failed to remove rotten boards, floors, supports and other material that should have been removed to make *the place* reasonably safe" the landlord "was guilty of *misfeasance*, and not *nonfeasance*." (*Lasky* v. *Rudman*, 337 Mo. l. c. 560, 85 S. W. (2d) l. c. 503).

In this connection the Court has inadvertently overlooked the point that where the highest Court of the

state has thus announced a rule of law in disposing of a question presented to it, such announcement is an authoritative and controlling statement of the state law as of the date of the decision, regardless of whether the announcement was necessary to dispose of the case. *Six Companies of California* v. *Joint Highway District,* 311 U. S. 180, 187.

Defendant's liability to plaintiff is of course the same as it would have been to its tenant Sweeney had he been injured. The landlord's liability extends to the family, servants and guests of the tenant using the premises which the landlord has let to the tenant and undertaken to repair. *Shaw* v. *Butterworth,* 327 Mo. 622, 628, 38 S. W. (2d) 57, 60. Indeed, the Circuit Court of Appeals has made no attempt to rule the liability of the landlord different as between a tenant and a servant or invitee of the tenant.

It is respectfully submitted that the Circuit Court of Appeals in holding that under the Missouri law defendant could have been liable only for negligent acts in actually attempting to repair the tread, and was not liable for failure to discover and repair the tread even though defendant had undertaken to repair the entire stairs, has erroneously decided an important question of Missouri law contrary to the applicable and controlling Missouri decisions.

Point B.

In ruling the question of defendant's negligence contrary to the Missouri decisions, the Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. Since federal jurisdiction is based upon the fact that defendant is a federal corporation, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The question of defendant's negligence is not governed nor affected by any federal statute or federal policy. The rule of Erie R. R. Co. v. Tompkins applies. The Missouri law "would furnish the governing principles," and have "controlling effect," even if it should be held, contrary to plaintiff's contention, that the rule of Erie R. R. Co. v. Tompkins is not strictly applicable.

All three opinions in the case of *D'Oench Duhme & Company, Inc.* v. *Federal Deposit Insurance Corp.*, No. 206, October Term, 1941, decided March 2, 1942, hereinafter referred to as the Federal Deposit Insurance Corporation case, disclosed that this Court took jurisdiction in that case to determine the precise question of whether the rule of *Erie R. R. Co.* v. *Tompkins* applies where federal jurisdiction is based upon the fact that a federal corporation is a party. The Court did not decide the question in that case because it did not find that the question was necessarily involved. It is our contention that the precise question is necessarily involved in the case at bar.

The Federal Deposit Insurance Corporation case was a suit by the corporation upon a note, and the decision of this Court involved the question of what law was to be applied in determining the validity of the defense asserted. The defense was denied in turn by the District Court of Missouri and the Circuit Court of Appeals for the Eighth Circuit. The District Court held the Illinois law was applicable. The Circuit Court of Appeals "applied 'general law' to determine that the note was an Illinois rather than a Missouri contract," and held the defense not good under the Illinois law. In this Court the defendant contended that under *Erie R. R. Co.* v. *Tompkins*, and *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487, the District Court, sitting in Missouri, was required to apply Missouri's conflict of law rules, and

that by such standard it was necessary to determine the question under the Missouri law.

In the opinion delivered by Mr. Justice Douglas the Court held that the validity of the defense was governed by provisions of the Act of Congress incorporating the plaintiff Federal Deposit Insurance Corporation[2]; that the validity of the defense involved "decision of a federal not a state question." The Court held that under its view of the federal question the defense was not good, and affirmed the judgments of the Circuit Court of Appeals and the District Court.

It was the opinion of Mr. Justice Frankfurter, concurred in by the Chief Justice, that while the Court had reached the correct result, the validity of the defense in the case was not a federal question but one to be determined by the law of either Missouri or Illinois; that the defense was not good under the law of either state.

It was the opinion of Mr. Justice Jackson that the question was one of federal law, both by reason of the provisions of the Federal Deposit Insurance Corporation Act relied upon by the Court in the opinion delivered by Mr. Justice Douglas, and by reason of another provision in the Act, to the effect that "all suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States * * *." (12 U. S. C., Sec. 264(j)). It was the opinion of Mr. Justice Jackson that the latter provision was more than a jurisdictional provision in view of the provision immediately preceding it, which gave the corporation power "to sue and be sued, complain and defend, in any court of law or equity, State

2. Provisions of the Federal Reserve Act, 12 U. S. C., Sections 264(s) and (y) evidencing a "federal policy" to "protect" the Federal Deposit Insurance Corporation from "misrepresentations as to the genuineness or integrity of securities in the portfolios of banks * * *." (Opinion of Mr. Justice Douglas. *D'Oench, Duhme & Co., Inc.*, v. *Federal Deposit Insurance Corporation*, No. 206, pages 3 and 5.)

or Federal," which Mr. Justice Jackson said was sufficient for the purpose of jurisdiction.

The Home Owners' Loan Act contains no provision in respect to the liability of the corporation for negligence, under the circumstances mentioned in the case at bar or any other circumstances, except that Home Owners' Loan Corporation should "have authority to sue and be sued in any court of competent jurisdiction, Federal or State * * *." (12 U. S. C., Sec. 1463(a)). This provision was neither a specific limitation of liability for negligence nor a general declaration that the liability of the Home Owners' Loan Corporation was a federal question or a matter of federal policy. On the contrary, it indicated an intent of Congress that the Home Owners' Loan Corporation should be subject to suit either in contract or in tort, to the same extent as any private person or corporation, and in any court of competent jurisdiction, Federal or State. *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 396.

Incidentally the provision of the Home Owners' Loan Corporation Act giving the corporation authority to sue and be sued in "any court of competent jurisdiction, Federal or State" did not even confer federal jurisdiction. On the contrary it left the question of "court of competent jurisdiction, Federal or State" to the general federal statutes. It was by virtue of the general federal statutes, (28 U. S. C., Sec. 41(1) and Sec. 42) that the District Court had jurisdiction of the case as an action against a federal corporation wholly owned by the government of the United States (12 U. S. C., Sec. 1463(b)).

It is respectfully submitted therefore that the question of defendant's negligence in the case at bar was not a federal question either under the opinion of the Court delivered by Mr. Justice Douglas, or under the opinion of Mr. Justice Jackson, in *D'Oench Duhme & Company,*

Inc. v. *Federal Deposit Insurance Corp.* It is further submitted that since, as pointed out in Point A, *supra,* the Circuit Court of Appeals in reversing the District Court has ruled contrary to the Missouri law, the question of whether the Missouri law is controlling or to be applied is necessarily involved.

It is respectfully submitted that the rule of *Erie R. R. Co.* v. *Tompkins* is fully and strictly applicable. Inasmuch as the question of negligence is not governed nor affected by any federal statute or federal policy, the mere circumstance that federal jurisdiction was acquired by virtue of the fact that the defendant was a federal corporation rather than on the ground of diversity of citizenship, should afford no reason for not applying the rule of *Erie R. R. Co.* v. *Tompkins.* When Congress authorized the Home Owners' Loan Corporation to sue and be sued in any court of competent jurisdiction, it manifestly intended to put the corporation on the same basis toward the citizens of the various states as any private corporation or individual engaged in a similar business, including the business of owning property and renting it for hire. Such is the reasoning and effect of the decision of this Court in *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381, 396, wherein this Court reached the conclusion that a similar authority to the federal corporation there involved included authority to be sued for tort as well as for breach of contract.

The question of negligence being governed by no federal statute or federal policy, the same reason for uniformity in the application of the common law within the states applies to the case at bar as applies to a case where jurisdiction is based upon diversity of citizenship. It is submitted therefore that the rule of *Erie R. R. Co.* v. *Tompkins,* and the diversity of citizenship cases which have followed it, is strictly applicable in the case at bar,

and in any other case as to any question of substantive law not controlled by federal statute or federal policy. It is respectfully submitted that the case at bar and similar cases are governed, to the same extent as diversity of citizenship cases, by the Rules of Decision Act (28 U. S. C., Sec. 725), which provides "the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Finally, if, contrary to our contention, it should be held that the rule of *Erie R. R. Co.* v. *Tompkins* is not strictly applicable, it is respectfully submitted that the Missouri law should be held to "furnish the governing principles" and have "controlling effect," in determining the question of defendant's negligence in the case at bar, under the rule which has existed independently of the rule of the Erie R. R. Co. case, in cases having some federal aspects, but where the particular question involved was not governed or affected by any federal statute or federal policy. *Royal Indemnity Co.* v. *U. S.*, 313 U. S. 289, 296; *Just* v. *Chambers*, 312 U. S. 383, 387; *Board of Commissioners* v. *U. S.*, 308 U. S. 343, 352; *U. S.* v. *Guaranty Trust Co.*, 293 U. S. 340; *Brown* v. *U. S.*, 263 U. S. 78, 86; *Seaboard Air Line Ry. Co.* v. *U. S.*, 261 U. S. 299, 306; *O'Sullivan* v. *Felix*, 233 U. S. 318; *McClaine* v. *Rankin*, 197 U. S. 154, and cases cited.

In the Board of Commissioners case the Court said (308 U. S. 352):

> "In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved tax-payers in their relation with the states or their political subdivisions. * * *."

It is respectfully submitted that "in the absence of explicit legislative policy" exempting the Home Owners' Loan Corporation from the duty imposed upon private landlords engaged in a similar business by the law of Missouri, it is proper to "draw upon a general principle" that persons injured by acts or omissions of the Home Owners' Loan Corporation, which would constitute negligence under the Missouri law on the part of a private person or corporation owning property and renting it for hire in Missouri, are entitled to recover against the Home Owners' Loan Corporation under the same Missouri law.

The record and opinion of the Circuit Court of Appeals unmistakably present and necessarily involve both the question of whether the Circuit Court of Appeals has determined the issue of defendant's negligence contrary to the Missouri decisions, and the question of whether defendant's negligence is governed by the Missouri law. The result reached by the Circuit Court of Appeals is not to be justified upon any other law. The Court proceeded, in *the abstract*, upon the theory that the Missouri law governs, and in its opinion *purports* to determine the question upon the Missouri law. The Court has not undertaken to "gather" the law as to defendant's negligence from any source other than Missouri law. Indeed, the opinion of the Circuit Court of Appeals does not even purport to represent the personal opinions of the writer of the opinion and the concurring judges. If, therefore, as we contend, the Circuit Court of Appeals has determined the question of defendant's negligence contrary to the Missouri decisions, the result reached is supported only by an erroneous construction of the Missouri law.

It is respectfully submitted that the decision of the Circuit Court of Appeals should be reviewed, and re-

versed, for failure of the Circuit Court of Appeals to follow the Missouri law in determining the question of defendant's negligence.

Point C.

In holding that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway, contrary to the findings of the District Court, and the evidence, that defendant assumed to repair the entire stairway, the Circuit Court of Appeals has violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." The Circuit Court of Appeals has thereby decided an important question of federal law which has not been, but should be, settled by this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court.

The ruling of the Circuit Court of Appeals, the District Court's findings, and a summary of the evidence supporting the District Court, are set out, with full references to the record, at pages 8, 9, 10 of our Petition.

Prior to the adoption of the Federal Rules of Civil Procedure, effective September 16, 1938 (Rule 86), it was the settled rule of this Court that the findings of fact of a District Court in an action at law tried to the Court without a jury, supported by substantial evidence, were conclusive on the Circuit Court of Appeals, on a review of the judgment of the District Court. *McCaughn* v. *Real Estate Land Title & Trust Co.*, 297 U. S. 606, 608, and cases cited. In the McCaughn case the Court said:

"* * * The instant case is controlled by the established rules relating to appellate review in actions at law where a jury trial has been waived. R. S. 649, 700; 28 U. S. C. 773, 875. Where a general verdict is found by the trial court, it has the same effect as the verdict of a jury. The appellate court cannot pass upon the weight of evidence. *Norris* v. *Jackson*, 9 Wall. 125, 128; *British Queen Mining Co.* v. *Baker Silver Mining Co.* 139 U. S. 222; *Lehnen* v. *Dickson*, 148 U. S. 71, 73; *St. Louis* v. *Western Union Telegraph Co.*, 166 U. S. 388; *Law* v. *United States*, 266 U. S. 494; *Fleischmann Construction Co.* v. *United States*, 270 U. S. 349, 356, 357; *Harvey Company* v. *Malley*, 288 U. S. 415, 418, 419; *Eastman Kodak Co.* v. *Gray*, 292 U. S. 332, 336, 337.

"Here, plaintiffs' exceptions to the conclusions of law of the trial court, and to the refusal of the court to reach other conclusions as requested, raised no question save the one of law, whether the court's verdict was wholly without evidence to sustain it. That question does not appear to be substantial. The ultimate question for the decision of the trial court was one of fact and its general verdict was conclusive. The Circuit Court of Appeals was without authority to weigh the evidence and to make its own findings.

"The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed."

It is respectfully submitted that the Federal Rules of Civil Procedure do not authorize a Circuit Court of Appeals to *disregard* and *set aside* findings of fact of a District Court in a case tried to the Court without a jury, where the findings are supported by substantial evidence; and, the Circuit Court of Appeals in the case at bar, in holding that the defendant did not undertake to repair the basement stairway, but merely the lower landing, we respectfully submit, "has so far de-

parted from the accepted and usual course of judicial proceedings, * * * as to call for an exercise of this Court's power of supervision," and present a case for review by certiorari under Rule 38, Par. (b).

It is submitted that the ruling of the Circuit Court of Appeals violates the Federal Rules of Civil Procedure. The Rules were adopted by this Court under the authority delegated by the Congress, Act of June 19, 1934, c.651, Secs. 1 and 2, 48 Stat. 1064 (28 U. S. Code, Sec. 723b and 723c). Rule 52(a) provides: "In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment * * *." The District Court in the case at bar complied with these provisions (R. 307-310). Rule 52(a) further provides: "Findings of facts shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

It is manifest, we submit, that these provisions of Rule 52 do not authorize the Circuit Court of Appeals to disregard and in effect set aside findings of fact supported by substantial evidence. On the contrary, it is submitted, findings of fact supported by substantial evidence cannot be set aside as clearly erroneous, and under the Rule are conclusive on the Circuit Court of Appeals. It is respectfully submitted that in ruling the facts contrary to the findings of the District Court, supported by substantial and indeed practically uncontradicted evidence, in the face of the provisions of Rule 52(a), the Circuit Court of Appeals has decided "an important question of federal law which has not been, but should be, settled by this Court."

Finally, the Circuit Court of Appeals in the case at bar in so ruling contrary to the findings of fact and

the evidence, and contrary to the provisions of Rule 52(a), has ruled contrary to the decisions of other Circuit Courts of Appeals upon the question of the binding effect of a finding by the District Court, supported by substantial evidence, under Rule 52(a). Without exception, the decisions of the Circuit Courts of Appeals of other circuits are to the effect that such findings are conclusive and cannot be set aside on appeal.

McCaughn v. *Real Estate Company*, 297 U. S. 606, 608.

The Josephine & Mary, (1 Cir.), 120 F. (2d) 459.

Cray, McFawn & Co. v. *Hegarty, Conroy & Co.*, (2 Cir.), 109 F. (2d) 443, affirming 27 F. Supp. 93.

Commonwealth Trust Co. of Pittsburgh v. *Reconstruction Finance Corporation*, (3 Cir.), 120 F. (2d) 254.

Smith v. *U. S.*, (3 Cir.), 121 F. (2d) 692, affirming 34 F. Supp. 947.

Buckley v. *Christmas*, (4 Cir.), 121 F. (2d) 323, certiorari denied 62 S. Ct. 180.

Chalk v. *U. S.*, (4 Cir.), 114 F. (2d) 207, certiorari denied 61 S. Ct. 449, 312 U. S. 679, 85 L. Ed.

Mississippi Valley Timber Co. v. *Mengel Co.*, (5 Cir.), 112 F. (2d) 947.

Van Auken v. *Second Nat. Bank & Trust Co., of Saginaw*, (6 Cir.), 117 F. (2d) 938, certiorari denied 61 S. Ct. 1118, 313 U. S. 593, 85 L. Ed. 1547.

Gary Theatre Co. v. *Columbia Pictures Corporation*, (7 Cir.), 120 F. (2d) 891.

Maier v. *Continental Oil Co.*, (7 Cir.), 120 F. (2d) 237, certiorari denied 62 S. Ct. 101.

Gates v. *General Casualty Co. of America*, (9 Cir.), 120 F. (2d) 925.

Maryland Casualty Co. v. *Stark*, (9 Cir.), 109 F. (2d) 212.

Mid-Continent Pipe Line Co. v. *Whiteley*, (10 Cir.), 116 F. (2d) 871.

Thatenhorst v. *U. S.*, (10 Cir.), 119 F. (2d) 567.

Consolidated Realty Corporation v. *Dunlop*, (App. D. C.), 114 F. (2d) 16, 72 App. D. C. 273.

Point D.

In ruling that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread, contrary to the findings of the District Court, and the evidence, that defendant in fact negligently failed to exercise ordinary care to repair the fourth tread, although it knew or by the exercise of ordinary care should have known of the defective and dangerous condition, the Circuit Court of Appeals has violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." The Circuit Court of Appeals has thereby decided an important question of federal law which has not been, but should be, settled by this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court.

The ruling of the Circuit Court of Appeals appears on page [redacted] of our Petition, the District Court's findings appear on pages 5 and 6 of our Petition, and a summary of the evidence supporting the District Court is set out with full references to the record, at pages [redacted] and [redacted] of our Petition.

We desire, however, to point out and emphasize the evidence of J. H. Young, a carpenter and housebuilder of forty-five years' experience (R. 213), who examined the fourth tread, Plaintiff's Ex. 11, and the photographs of the stairway, Plaintiff's Exs. 8 and 9 (R. 214), while on the stand. He testified: that a proper inspection would have revealed that the fourth tread was split clear through lengthwise; that the front half of the tread (which was only 3 7/8 inches wide) had an overhang of 1½ inches; that only one eight-penny nail went into the stringer, and one protruded outside the broken stringer; that the nails were not "the proper size" (R. 220); that the improper nailing and the overhang of 1½ inches made the tread "absolutely not" safe (R. 221); and further:

> "Q. State whether or not that would be a reasonably safe step. A. Absolutely not. * * * When that board becomes split, then it becomes dangerous.
>
> Q. All right. Now, Mr. Young, would the unsafe condition of that board as I have described it to you be apparent to any reasonably competent contractor who looked at it?
>
> A. Well, any contractor ought to see that that step was weak when it was split." (R. 221).

The testimony of Young was undisputed; the trial court saw the fourth tread and the photographs, and believed Young, and made its finding that the tread was unsafe, and described it in his written opinion as a "pitfall [which] was set for the unsuspecting occupants of defendant's property." (R. 316).

The trial court further said:

> "The inspector was, according to the preponderance of the evidence, grossly negligent in his inspection * * *." (R. 316).

Yet the Circuit Court of Appeals does not even mention Young's testimony, nor the finding of fact of the trial court that the defendant was negligent, but wholly disregarding them, boldly asserts "that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread, nor in failing to repair it." (R. 343).

The Court of Appeals decides this matter as though it were the original trier of fact, in violation of Rule 52(a).

Our argument and authorities in Point B, *supra* as to the error and grounds for review by this Court presented by the ruling of the Circuit Court of Appeals on the matter of facts there involved, are equally applicable to our present jurisdictional question for review by this Court. To save space and repetition we here adopt by reference that argument and those authorities.

CONCLUSION.

The reversal of plaintiff's judgment is based upon an erroneous construction of Missouri law, contrary to the controlling decisions of the Supreme Court of Missouri, fortified by erroneous disregard by the Circuit Court of Appeals of the findings of fact of the District Court upon substantial evidence, in violation of Rule 52(a). In effect and result, the Circuit Court of Appeals has assumed the prerogative of the Supreme Court of Missouri to change the Missouri law, and the prerogative of the District Court to find and determine the facts upon substantial evidence. Petitioner respectfully prays that the writ of certiorari be granted, that the judgment of the Circuit Court of Appeals be reversed

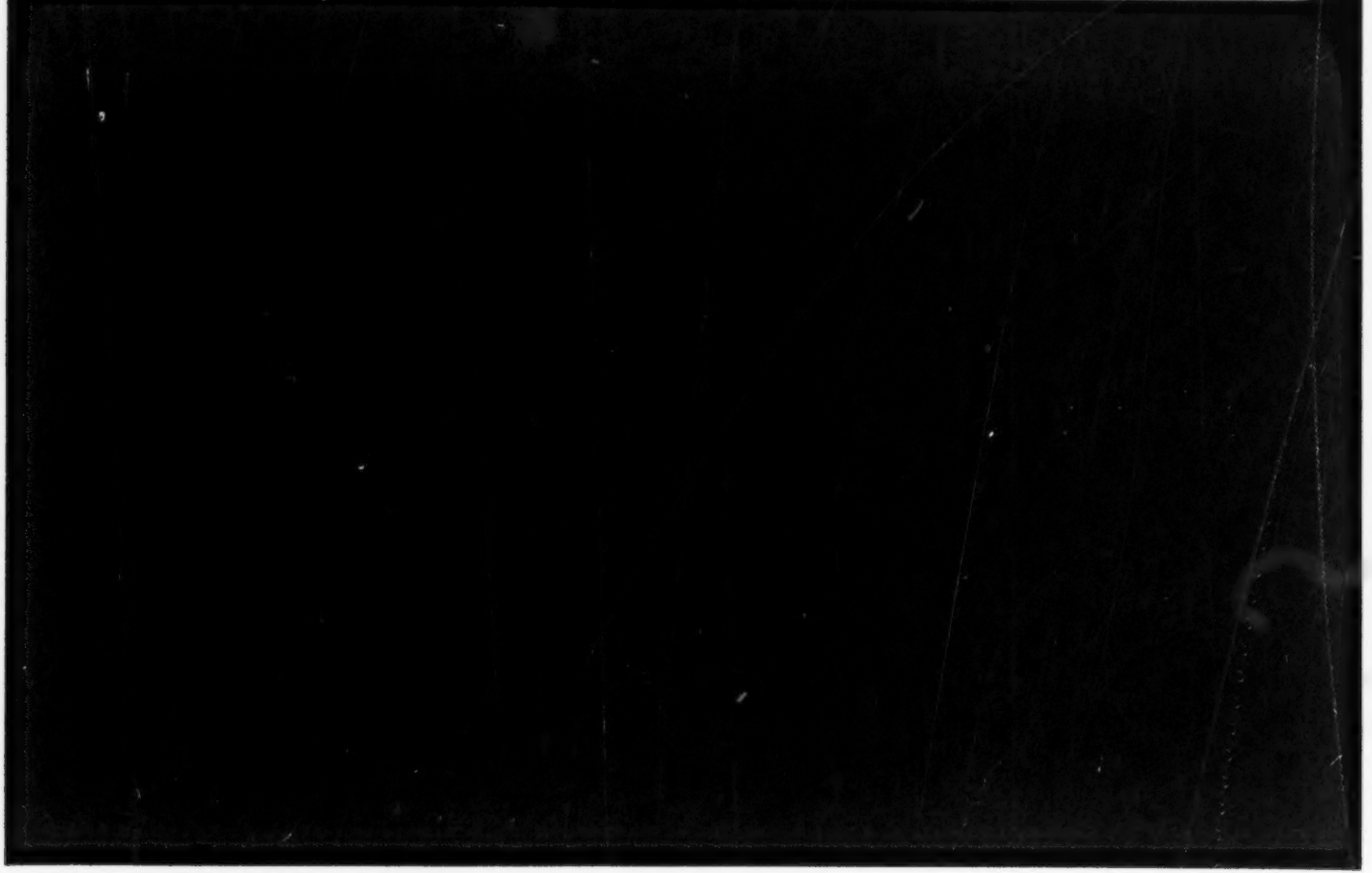
and the judgment of the District Court be affirmed and reinstated.

Respectfully submitted,

PRICE WICKERSHAM,
Bryant Building,
Kansas City, Missouri,

WILLIAM S. HOGSETT,
HALE HOUTS,
Fidelity Building,
Kansas City, Missouri,

Counsel for Petitioner.



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456625—42

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1110

MAE HUFFMAN, PETITIONER

v.

HOME OWNERS' LOAN CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Western District of Missouri (R. 313–317) is reported in 39 F. Supp. 139. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 335–343) is reported in 124 F. (2d) 684.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 13, 1942 (R. 343–344). A petition for rehearing was filed on January 28, 1942 (R. 345–356) and denied on February 2, 1942 (R. 357). The petition for a writ of cer-

tiorari was filed on April 4, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent leased a dwelling house in Kansas City, Missouri, to petitioner's employer. Petitioner, while employed on the premises, tripped on a defective tread of the cellar stairs, sustained injuries, and sued respondent in tort for damages. Respondent's agents had repaired the bottom landing of the stairway, and had inspected the remainder of the dwelling to determine whether other repairs were necessary, but had not attempted to repair the defect in the tread which caused the fall. The question is whether, in these circumstances, a landlord may be liable in tort, under Missouri law, to his tenant or the tenant's invitees.

STATEMENT

Petitioner, a Missouri citizen, brought this action in the District Court for the Western District of Missouri, under Judicial Code, sec. 24 (1), 28 U. S. C. sec. 41, and the Act of February 13, 1925, ch. 229, sec. 12, 43 Stat. 936, 941, 28 U. S. C. sec. 42,[1]

[1] Act of February 13, 1925, sec. 12, 28 U. S. C. sec. 42, provides as follows:

"No district court shall have jurisdiction of any action or suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress. This

to recover damages incurred as a result of respondent's alleged negligence (R. 1–4). Jury trial was waived (R. 11), and a trial was had before the District Court, who gave judgment for petitioner in the sum of $20,000 (R. 7–8, 317). On appeal, the Circuit Court of Appeals reversed (R. 336–343).

The material facts are undisputed. Respondent, a wholly owned Government corporation,[2] leased a dwelling house in Kansas City, Missouri, which it had acquired through foreclosure, to one Sweeney for use partly as a dwelling and partly as a beauty parlor (R. 307). Prior to the negotiations with Sweeney, respondent employed an experienced carpenter, Butterworth, to examine the premises and thereafter showed Sweeney the carpenter's written specifications as to the repairs necessary (R. 113–115, 310, 338). The only repair of the basement stairs suggested in the report was of the landing (R. 141, 246). After the execution of the lease, respondent employed a con-

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section shall not apply to any suit, action, or proceeding brought by or against a corporation incorporated by or under an Act of Congress wherein the Government of the United States is the owner of more than one-half of its capital stock."

[2] Respondent was created by the Federal Home Loan Bank Board pursuant to the Act of June 13, 1933, c. 64, sec. 4 (a), 48 Stat. 128, 129, 12 U. S. C. sec. 1463. It is "an instrumentality of the United States" which has the "authority to sue and to be sued in any court of competent jurisdiction, Federal or State." Sec. 4 (a).

tractor to make the particular repairs set forth in the specifications (R. 235–247) and the landing of the basement stairs was repaired accordingly (R. 249, 310). Respondent also employed an inspector, King, to see that the contractor made the repairs in accordance with the specifications (R. 170–171, 179) and, perhaps, to report any other defects or unsafe conditions which he might discover (R. 170, 179–180, 183–185). The inspector did not report any defect or condition such as caused the accident here in the basement stairway (R. 170–186) and respondent never attempted to make any repairs of these stairs other than of the landing (R. 310). Petitioner, who was employed as a beauty operator by Sweeney's wife, descended the cellar stairs in order to secure some materials for use in her work, and fell headlong down the stairs when a defective tread gave way under her weight (R. 308, 313). This tread had long had a seasonal lengthwise crack, and was not securely fastened down, although it was not loose (R. 1, 307, 342).

There was also evidence that respondent's representatives told Sweeney that respondent would put the "house" or "place" in "safe" or "rentable" condition (R. 189, 193, 302–303), and that respondent's inspector, King, knew that a nail protruded from the tread without connecting to the stringer to which it should have been secured (R. 174). There was no evidence that respondent

specifically agreed to repair any part of the basement stairs other than the landing.

The District Court found that respondent agreed to "repair and put said premises, including the flight of wooden steps leading from the first floor to the basement of said premises, in reasonably safe condition for use and occupancy" (R. 307, 315), that respondent inspected the steps of the stairway to determine whether there were any defective and dangerous conditions therein and knew or should have known of the dangerous condition of the tread in question (R. 315, 317), that the only repair made by respondent was in the landing at the bottom of the stairs (R. 310), and that respondent was negligent in failing to repair the defective tread (R. 309, 315).[3] On the basis of these findings the District Court held that, under Missouri law, petitioner was entitled to recover.

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[3] The District Court also found that the respondent "undertook and attempted" to repair the "steps leading from the first floor to the basement" (R. 307). The uncontradicted testimony of the respondent's Inspector King, however, shows that apart from making the repairs set forth in the specifications the only action affirmatively taken by respondent with respect to any other possible defects was to cause an inspection to be made (R. 179–180, 170), and it is clear from the opinion of the District Court (R. 315) that the court did not intend to find to the contrary. The District Court's opinion rests wholly on the failure of the carpenter, Butterworth, who originally examined the premises, to discover the defect in the tread (R. 315), while petitioner stresses the asserted negligence of King, who inspected the contractor's repairs (Pet. p. 9, 12).

In reversing the judgment of the District Court, the Circuit Court of Appeals held that, under Missouri law, the respondent was liable in tort only for injuries caused by "its active and direct negligence" (R. 339), that negligence in making an inspection afforded no basis for liability (R. 339) and that, since the respondent "undertook and attempted" to repair only the landing at the bottom of the basement stairs, the respondent was not responsible for any injuries incurred as a result of the defect in the tread in question (R. 338–341). The court below further concluded that there was no substantial evidence to support the finding of the District Court that the respondent had agreed to repair the stairway, other than the landing, or the finding that it had been negligent in failing to do so (R. 341–343).

ARGUMENT

No question has been raised by any of the parties or by the courts below as to whether the law of Missouri should be applied; the parties have assumed that it should, and the courts below have attempted to apply it. Accordingly, the ultimate question is simply whether the court below has correctly interpreted the relevant Missouri decisions. We submit that the court below has done so, and that the question does not call for further review by this Court.

On the undisputed facts of this case, respondent is not liable in tort as a matter of Missouri law.[4] It is well settled in Missouri that a landlord is not liable in tort, either to his tenant or to the tenant's invitee, for failing to carry out a covenant to repair. *Lahtinen* v. *Continental Bldg. Co.,* 339 Mo. 438, 448–449; *Kohnle* v. *Paxton,* 268 Mo. 463; *Norris* v. *Walker,* 232 Mo. App. 645, 651; *Logsdon* v. *Central Development Assn. Inc.,* 233 Mo. App. 499, 505–506; *Davis* v. *Cities Service Oil Co.,* 131 S. W. (2d) 865, 870 (Ct. App.). The landlord incurs liability only when he actually undertakes and attempts to repair, and is negligent either in making the repairs attempted to be made or in failing adequately to repair that part of the premises which he actually sets about to remedy. *Lasky* v. *Rudman,* 337 Mo. 555, 558, 560; *Shaw* v. *Butterworth,* 327 Mo. 622, 628; *Logsdon* v. *Central Development Assn. Inc., supra,* at 506; *Vollrath* v. *Stevens,* 199 Mo. App. 5, 9; *Kennedy* v. *Bressmer,* 154 S. W. (2d) 401, 406 (Ct. App.). This is so whether the repairs are undertaken pursuant to agreement or gratuitously. *Lahtinen* v. *Continental Bldg. Co.,* 339 Mo. 438, 447 (*en banc*).

[4] Plaintiff's action sounds in tort and not in contract (Pet. p. 8, n. 4) presumably because in an action for breach of a covenant to repair no recovery may be had for personal injuries. *Norris* v. *Walker,* 232 Mo. App. 645, 651; *Marcheck* v. *Klute,* 133 Mo. App. 280, 292.

Significance is attached only to what is done, not to what is promised.[5]

Here, it is undisputed that the only repair made by the respondent was in the landing at the bottom of the stairs (R. 310), and there is no evidence that it ever repaired or attempted to repair any other part of the stairway. Respondent, it is true, made an inspection of the premises, including all of the basement stairway, but it is undisputed that the inspector employed for this purpose never reported any defect in the tread in question and that the respondent never attempted

[5] In *Lasky* v. *Rudman*, *supra*, upon which petitioner relies (Pet. 7, 14, 15, 18, 19), the landlord's agents had actually attempted to repair the very porch railing which gave way, and the decision clearly rests upon that fact. Similarly, in *Shaw* v. *Butterworth*, the very screen which fell had been negligently installed by the landlord. In *Kennedy* v. *Bressmer*, the St. Louis Court of Appeals pointed out that "In our case defendant had undertaken to repair the very post which gave way and caused plaintiff to fall" (p. 406). And in *Logsdon* v. *Central Development Assn. Inc.*, where a landlord who had repaired a leaking faucet was absolved from liability for injuries caused by the broken porcelain handle of the same faucet, the Kansas City Court of Appeals remarked that "this rule creating liability does not extend so as to relate to the part of the premises that the landlord did not attempt to repair unless affected thereby" (p. 506). Cf. *Byers* v. *Essex Investment Co.*, 281 Mo. 375. There is a conflict in the Missouri decisions as to whether a landlord who undertakes a repair is liable if his negligence in making the repair does not increase the danger to the tenant. Compare *Davis* v. *Cities Service Oil Co.*, 131 S. W. (2d) 865, with *Kennedy* v. *Bressmer*, 154 S. W. (2d) 401.

to repair this tread. The court below concluded that such inspection did not amount to an undertaking or attempt to make repairs within the meaning of the Missouri decisions. Petitioner has pointed to no Missouri decision and we have found none which suggests that negligence in such inspection without more affords any basis for imposing liability on the landlord. And the cases cited above would seem to require the contrary conclusion. The decision below is therefore in harmony with the applicable local law.

CONCLUSION

The decision below is correct, is in accord with the applicable Missouri law, and presents no question of importance. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
MELVIN H. SIEGEL,
OSCAR H. DAVIS,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1110

MAE HUFFMAN, PETITIONER,

VS.

HOME OWNERS' LOAN CORPORATION, RESPONDENT.

PETITIONER'S REPLY BRIEF.

PRICE WICKERSHAM,
Bryant Building,
Kansas City, Missouri,

WILLIAM S. HOGSETT,
HALE HOUTS,
Fidelity Building,
Kansas City, Missouri,
Counsel for Petitioner.

FRANK T RILEY PUB CO KANSAS CITY MO

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PETITIONER'S REPLY BRIEF.

Counsel for respondent at page 6 of their brief in opposition observe that the parties have assumed that the Missouri law should be applied and the Courts below have attempted to apply it. Counsel contend that the Circuit Court of Appeals has correctly applied the Missouri law and that "on the undisputed facts of this case respondent is not liable in tort as a matter of Missouri law." They argue "the ultimate question is simply whether the Court below has correctly interpreted the relevant Missouri decision."

It remains clear that if, as we contend, the Circuit Court of Appeals ruled the question of defendant's negligence contrary to the applicable Missouri decisions (Pet.

B. 28-34), there is raised the important question of federal law whether the local Missouri law is applicable and governs where federal jurisdiction is based upon the fact that the defendant is a federal corporation (Pet. B. 34-40). It also remains clear that in holding that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway, and that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread, the Circuit Court of Appeals disregarded the findings of fact of the trial court supported by substantial and abundant evidence, contrary to the provisions of Rule 52(a) of the Federal Rules of Civil Procedure and the accepted and usual course of judicial proceedings (Pet. B. 41-47). Indeed respondent in effect admits that it *undertook to repair the entire stairway* and that it was negligent in not repairing the fourth tread.

At page 4 of its brief respondent admits that its representative told Sweeney that the respondent would put the house or place in a safe and rentable condition, employed a contractor to make certain repairs, and employed King to inspect the premises as the work progressed, check the contractor, and report any other defects or unsafe conditions which he might discover.[1] Respondent thereby in effect concedes that the finding of the trial court that respondent undertook to repair the entire premises, including the basement stairway, was supported by the evidence.

1. In the performance of those duties King made five inspections; inspected the stairway to see that it was secure and safe, checked along the stringers, stood alongside the stairs, examined to see what kind of nails were holding the treads, went under the stairway to see that nails were "nailed in properly," hunted anything "unsafe" whether included in the contractor's specifications or not; it was his duty to report anything making the place unsafe "and get something done about it" (Pet. 8-10). Thus the defendant "set about" (respondent's brief, p. 7) to make the whole stairway safe.

At pages 4 and 5 of their brief counsel for respondent say, "there was no evidence that respondent specifically agreed to repair any part of the basement stairs other than the landing." By this counsel must mean that the fourth tread was not specifically mentioned. Having admitted that respondent told Sweeney that it would put the entire house or place in safe and rentable condition they certainly cannot mean to say that respondent didn't agree to repair the basement stairs, which were a part of the house.

Counsel for respondent at page 8 of their brief contend that "significance is attached (by Missouri decisions) only to what is done, not what is promised." *On the contrary*, promises or agreements of the landlord are competent evidence of the landlord's undertaking to repair. *Shaw* v. *Butterworth*, 327 Mo. 622, 628-9, 38 S. W. (2d) 57, 60. *Moreover*, the fact that respondent employed King to make inspection during the progress of the work, and not only check the contractor's compliance with the specifications under which he was working, but also to report any other defect or unsafe condition which King might discover, so that it would be repaired (Respondent's Brief p. 4, Pet. pp. 9-10), establishes an undertaking to repair the *entire stairway*, evidenced by "*what was done.*"

Respondent incorrectly agrues on page 9 of its brief that there is no Missouri decision suggesting that negligence in inspection affords any basis on imposing liability on the landlord. Under the Missouri law the repair of premises by a landlord involves the duty to exercise reasonable care to *discover and repair* defective conditions. Inspection to *discover* defective conditions is necessarily an undertaking to repair, and the negligent failure to discover and repair a defect dis-

coverable by ordinary care, constitutes actionable negligence under such undertaking. *Lasky* v. *Rudman*, 337 Mo. 555, 560, 85 S. W. (2d) 501, 503.

On page 4 of its brief respondent admits that the tread in question was cracked from end to end and "not securely fastened down"; admits that King did not report the condition to respondent; admits that King knew that "a nail protruded from the tread without connecting to the stringer to which it should have been secured." [2] Respondent thereby in effect concedes that in ruling that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread the Circuit Court of Appeals erroneously disregarded the findings of fact of the trial court, supported by substantial evidence, in violation of Rule 52(a). King was of course the agent of respondent, both as to respondent's undertaking to repair and as to its attempt to repair. The negligence of King in failing to report the defective condition was negligence of the respondent, in failing to "discover and repair" the defect of the fourth tread.

Finally counsel for respondent in effect admit that the respondent was liable under the Missouri law, when they admit, on page 7 of their brief, that under the Missouri law the landlord incurs liability "when he actually undertakes and attempts to repair, and is negligent either in making the repairs attempted to be made or in failing adequately to repair that part of the premises which he actually sets about to remedy." When respondent told Sweeney that it would put the house in safe and rentable condition (Respondent's Brief, p. 4) by performing "general and complete" repairs (Pet. pp. 8-9), and sent King out to inspect while the contractor was working, and re-

2. The evidence of negligence was much stronger than respondent's admission (Pet. pp. 10-12).

port any defect or unsafe condition, to the end that it might be repaired, although not in the contractor's specifications (Respondent's Brief, p. 4, Pet. pp. 8-10), respondent, to use the language of respondent's counsel on page 7 of their brief, "*set about to remedy*" all defects in the entire stairway which were discoverable by the exercise of ordinary care. When King failed to report the admittedly defective step and tread, although he should have known (Pet., pp. 10-12) and in fact did know (Respondent's Brief, p. 4) it was defective, respondent itself was negligent "*in failing to adequately repair*" (Respondent's Brief, p. 7) the stairway, by failing to "*discover and repair*" (*Lasky* v. *Rudman*, 337 Mo. 555, 560, 85 S. W. (2d) 501, 503) the defect in the fourth tread.

The Circuit Court of Appeals failed to follow the Missouri law and the record presents the questions for review asserted in our petition and original brief. Petitioner renews her prayer that writ of certiorari issue.

Respectfully submitted,

PRICE WICKERSHAM,
Bryant Building,
Kansas City, Missouri,

WILLIAM S. HOGSETT,
HALE HOUTS,
Fidelity Building,
Kansas City, Missouri,
Counsel for Petitioner.